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IN THE
Supreme Court of the United States
October Term, 1987

FRANK LEOGRANDE, FRANK SALERNO, EUGENE LEOGRANDE, NICHOLAS BONINA, IRA BAER, MITCHELL DRUCKER, EDWARD ZIMMERMAN, CHRISTOPHER FURNARI and PETER LODUCA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the evidence presents a sufficient disagreement to require a hearing or whether it is so one-sided that the defendant must prevail as a matter of law.

2. Whether a penalty can be extracted under 26 U.S.C. §6702 for the claiming of the right to silence under the Fifth Amendment to the Constitution without the claimants thereof being permitted *in camera* to indicate their basis for assertion of the privilege or may the court in a vacuum determine that a claim is baseless or spurious solely on the evidence of its claim on income tax returns.

3. Must the basis for constitutional objections be revealed on tax returns in violation of this court's holding in *Garner v. U.S.*, 424 U.S. 648.

4. Should this Court assert its supervisory powers to bar compelled revelation of the amount of income and subsequent incriminating use which would violate the essence of the accusatorial system of justice.

5. May costs and attorneys' fees be awarded under Federal Rule of Civil Procedure 11 with regard to assertion of Fifth Amendment privilege where positive disclosure of basis is asserted.

LIST OF PARTIES

Petitioners, FRANK LEOGRANDE, FRANK SALERNO, EUGENE LEOGRANDE, NICHOLAS BONINA, IRA BAER, MITCHELL DRUCKER, EDWARD ZIMMERMAN, CHRISTOPHER FURNARI and PETER LODUCA were plaintiffs in the United States District Court, Southern District of New York and appealed to the Second Circuit United States Court of Appeals.

TABLE OF CONTENTS

Pages

Questions Presented i

List of Parties i

Table of Contents ii

The Opinion of the Court Below 1

Jurisdiction 2

The Principal Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Petition 5

POINT I—Whether the Evidence Presents A Sufficient Disagreement To Require A Hearing Or Whether It Is So One-Sided That The Defendant Must Prevail As A Matter Of Law 6

POINT II—Whether A Penalty Can Be Extracted Under 26 U.S. Code §6702 For The Claiming Of The Right To Silence Under The Fifth Amendment To The Constitution Without The Claimants Thereof Being Permitted, *In Camera,* To Indicate Their Basis For Assertion Of The Privilege, Or May The Court In A Vacuum Determine That A Claim Is Baseless Or Spurious Solely On The Evidence Of Its Claim On A Tax Return 12

POINT III—Must The Basis For Constitutional Objections Be Revealed On Tax Returns In Violation Of This Court's Holding In *Garner v. U.S.* 15

POINT IV—Should The Court Assert Its Supervisory Powers To Bar Compelled Revelation Of The Amount Of Income And Subsequent Incriminating Use Thereof Which Would Violate The Essence Of The Accusatorial System Of Justice 18

POINT V—May Costs And Attorneys' Fees Be Awarded Under Federal Rule Of Civil Procedure 11 With Regard To The Assertion Of The Fifth Amendment Privilege Herein 19

Conclusion 21

Appendix A—Judgment and Order of the United States Court of Appeals for the Second Circuit 1a

Appendix B—Judgment of the United States District Court for the Eastern District of New York 6a

CITATIONS

Aune v. U.S., (D.C.-Ariz.), 522 F.Supp. 1132 (1984).....14

Betz v. U.S., 753 F.2d 834 (10th Cir., 1985) 4

Boomer v. U.S., 755 F.2d 696 (8th Cir., 1985) 4

Brennan v. C.I.R., 752 F.2d 187 (6th Cir., 1984) 4

California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed. 2d 9 (1971) 9,13

Celotex v. Catrett, 106 S.Ct. 2548 10

DeWitt v. Western Pacific R.R. Co., 719 F.2d 1448 (9th Cir., 1983) 19

Eicher v. U.S., 774 F.2d 27 (1st Cir., 1985) 4

Garner v. U.S., 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976) i,7,9,11,15,16,17

Hashagen v. U.S., 283 F.2d 345 (9th Cir., 1960) 13

Hoffman v. U.S., 341 U.S. 479, 71 S.Ct. 814 7,13,15

Hudson v. U.S., 766 F.2d 1288 (9th Cir., 1985) 4

Iannelli v. Long, (3rd Cir., 1973) 487 F.2d 317 20

Mackey v. U.S., 401 U.S. 711-713, 91 S.Ct. 1169-1171, 28 L.Ed.2d 431-3 11

Manness v. Myers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 20

Marchetti v. U.S., 390 U.S. 48, 88 S.Ct. 703 13

Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136 (1984) 19

Paulson v. U.S., 758 F.2d 61 (2d Cir. 1985) 4

Quinn v. U.S., 349 U.S. 155 (1955) 16

Ricket v. U.S., 773 F.2d 1214 (10th Cir., 1985) 4

Rogers v. U.S., 340 U.S. 367, 71 S.Ct. 438 10,13

Stamp v. Commissioner, 579 F.Supp. 168 (D.C. No. Dist. Ill., 1984) 8

Spevak v. Klein, 385 U.S. 511, 87 S.Ct.655, 17 L.Ed.2d 574 12

U.S. v. Barnes, CA-2, 1979, 604 F.2d 121, 146-8, *cert. den.,* 444 U.S. 907 (1980) 8,14

U.S. v. Brown, 600 F.2d 248 (10th Cir., 1979) 14

U.S. v. Edelson, 604 F.2d 232 (3rd Cir., 1979) 6

U.S. v. Jackskion, 102 F.2d 683 *cert. den.* 307 U.S. 635 (1939) 14

U.S. v. Schiff, 612 F.2d 73 (2d Cir., 1979) 4,8,11,14

U.S. v. Sullivan, 274 U.S. 259 (1927) 8,9

U.S. v. Weissman, 111 F.2d at 262 14

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1909 16

26 U.S. Code Sections 6702-6703 2

Amendment V to the Constitution of the United States ...2

IN THE
Supreme Court of the United States
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FRANK LEOGRANDE, FRANK SALERNO, EUGENE LEOGRANDE, NICHOLAS BONINA, IRA BAER, MITCHELL DRUCKER, EDWARD ZIMMERMAN, CHRISTOPHER FURNARI and PETER LODUCA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frank Leogrande, et al. pray that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit decided February 10, 1987 (Appendix A *infra*) which affirmed the judgment of the United States District Court for the Eastern District of New York (Nickerson, J.) granting summary judgment to appellee, dismissing appellant's complaints seeking a refund of penalties assessed for filing frivolous tax returns and awarding appellee costs and attorneys' fees under Federal Rule of Civil Procedure 11 (Appendix B).

THE OPINION OF THE COURT BELOW

The opinion of the court below, namely the United States Court of Appeals for the Second Circuit affirming

the decision and judgment, is set forth in Appendix A, *infra,* as aforesaid.

JURISDICTION

The order of the judgment of the United States Court of Appeals for the Second Circuit, the court below, is dated February 10, 1987. Jurisdiction of this court is invoked, made and conferred under 28 U.S. Code §1254(1).

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution
Sixth Amendment to the Constitution
Title 26 U.S. Code §6702-6703 (1982)
Federal Rules of Civil Procedure 11 and 56

STATEMENT OF THE CASE

The facts are undisputed. All of the aforementioned petitioners informed the Internal Revenue Service via unsigned, forwarded Forms 1040 that they relied on the Fifth and Sixth Amendments to the Constitution of the United States, and the only information contained thereon pertained to neutral identification questions, *i.e.,* name, addres, Social Security number, and amount of estimated tax payments made.

The United States asserted the Civil Frivolous Return Penalty under 26 U.S. Code §6702 and subsequently moved for summary judgment.

Each of the petitioners via opposition to motion for summary judgment offered specific basis for each of their claims, constituting a positive disclosure where the danger lies, *i.e.:*

Nicholas Bonina—CV 85-4112 indicted in Southern District of New York, narcotic conspiracy—S 82 Cr 0838 (WK) subsequently pled guilty and is now serving a five year term in the Federal Penitentiary.

Christopher Furnari—CV 86-0005 indicted in Southern District of New York—*US v. Salerno, et al.*, before Judge Owens. Subsequently convicted and is now sentenced to a term of 100 years in the Federal Penitentiary.

Ira Baer—CV 86-0001—Target of Grand Jury and FBI investigations in the Southern District of New York.

Peter LoDuca—CV 86-0006—Target of Grand Jury investigation in the Eastern District of New York—Assistant U.S. Attorney indicates that indictment is forthcoming. Subsequently indicted.

Frank Leogrande—Cv 85-4109
Frank Salerno—Cv 85-4110
Eugene Leogrande—Cv 85-4111
Frank Leogrande—Cv 86-0002
Mitchell Drucker—Cv 86-0003
Edward Zimmerman—Cv 86-0004

All have FBI numbers and no visible means of support and would justify their Fifth Amendment claims in an *in camera* proceeding. It is suggested that in order to be placed in that position, the Government must come forth to indicate that their records reveal no basis for these claims.

It becomes obvious that the plaintiffs are not tax protestors nor can the Government show that these are spurious or frivolous Fifth Amendment claims. No justification exists for the posture of the defendant herein

unless a claim of privilege on an income tax return, revealing identification and payments made, is not permitted.

The Second Circuit Court of Appeals followed the lead of several Federal Courts of Appeals in holding that a taxpayer cannot refuse to provide any financial information on a tax return based upon a blanket assertion of the Fifth Amendment privilege totally disregarding the effect, if any, of waiver.

The differences between *Leogrande et al.* and *Schiff, Paulson, Eicher, Ricket, Hudson, Boomer, Betz* and *Brennan,* cases relied on by the Second Circuit are as remarkable as is the paucity (*i.e.*, in a vacuum) of evidence upon which the Court's decision rests. In *Leogrande et al.*, specific basis for each individual's claim constituting a positive disclosure where the danger lies was asserted. In *Schiff, Paulson, Eicher, Ricket, Hudson, Boomer, Betz* and *Brennan,* no specific basis for the claim of privilege was offered. Thus, the latter did not undermine the Constitutional underpinnings of a citizen's right to remain silent. As was vividly revealed in *Hudson,* 766 F.2d 1288 *aff'g* unreported D.C.

> To invoke the Fifth Amendment privilege, the taxpayer must be faced with substantial hazards of self-incrimination that are real and appreciable and must have reasonable cause to apprehend such danger.

REASONS FOR GRANTING THE PETITION

1. The issue is important to safeguarding liberties, and protections afforded via constitutional protections of due process and self-incrimination under Amendment V.

2. Resolve a conflict between Third, Ninth and Second Circuit Courts of Appeals involving claim of Fifth Amendment protection pertaining to income tax returns.

3. Second Circuit Court of Appeals construction of act, 26 U.S.C. §6702 ignored its plain language and would frustrate its basic purpose, which is manifest in title and congressional reports, *i.e.*, Fifth Amendment claims must be spurious not barred from income tax returns.

4. Resolve a conflict in lower courts of inconsistent positions taken in determining when Fifth Amendment claims are appropriate or may a court simply ignore a claim of silence under the Fifth Amendment with regard to income tax returns even though specific basis for its claim via positive disclosure is made.

5. Pavlovian position taken by Internal Revenue Service in asserting frivolous return penalty under 26 U.S. Code §6702 for every Fifth Amendment claim of silence asserted on income tax returns ignores statutes plain language and requires abandonment of prior consistent precedent.

POINT I

WHETHER THE EVIDENCE PRESENTS A SUFFICIENT DISAGREEMENT TO REQUIRE A HEARING OR WHETHER IT IS SO ONE-SIDED THAT THE DEFENDANT MUST PREVAIL AS A MATTER OF LAW.

Code §6702 provides that if: (1) any individual files what purports to be a return of tax imposed by Subtitle A, but which (A) does not contain information in which the substantial correctness of the self-assessment may be judged or (B) contains information that on its face indicates that the self-assessment is substantially incorrect; and (2) the conduct referred to in paragraph 1 is due to (A) a position which is frivolous or (B) a desire (which appears on the purported return) to delay or impede the administration of Federal Income Tax laws, then such individual shall pay a penalty of $500.00.

Code §6703(a)—Burden of Proof:—

> "In any proceeding involving the issue of whether or not any person is liable for a penalty under 6700, 6701 or 6702, the burden of proof with respect to such issue shall be on the secretary."

Solely based on the fact that courts have allegedly held that a blanket claim of a constitutional privilege on a tax return is not valid, defendant moved for summary judgment based on the rationale expressed in *U.S. v. Edelson,* 604 F.2d 232 (3rd Cir., 1979).

The reliance thereon is misplaced since the court in *Edelson* expressly stated:

> In order to claim the privilege, however, the taxpayer must have a real basis for fearing that he would be subject to criminal prosecution if he were to answer the question in response to which he asserted the privilege, *Edelson* in contrast states only in a generalized manner that absent his use of the Fifth Amendment he may be prosecuted for tax fraud."

No justification was found for *Edelson's* blanket invocation of the Fifth Amendment privilege.

The court went on to say that:

> Of course, the mere fact that the privilege is asserted as to many, most or almost all of the questions on a return, does not deprive the taxpayer of his right to an opportunity to show that the privilege really was properly asserted as to all these questions. But *Edelson* had the requisite opportunity to submit his claim of privilege to the court for a determination of validity. *Hoffman v. U.S.*, 341 U.S. 479,486-487 (1951); see *Garner, supra,* 659 n. 11* citing *Marchetti."*

In the extant situation, each one of the plaintiffs revealed real and substantial basis indicating that volunteering source and amount of income would or could furnish a link in the chain of evidence that could lead to incrimination. *Infra.*

Once plaintiffs established via a positive disclosure where the danger lies for each individual's claim of the privilege of silence granted by the Fifth Amendment to the Constitution, the burden to articulate the spurious nature of the claim is on the Government. The legislative history clearly indicates that the burden is always on the Govern-

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Garner v. U.S., 424 U.S. 648.

ment to show that plaintiffs have no Fifth Amendment claim or that the Fifth Amendment claim is spurious. See *Stamp v. Commissioner,* 579 F.Supp. 168 (DC—No. Dist.—Ill. 1984) and Code §6703.

The Court of Appeals affirmed the judgment of the District Court without considering the privilege issue expressing the view that under *U.S. v. Schiff,* 612 F.2d 73, 83 (2d Cir., 1979) relying on *U.S. v. Sullivan,* 274 U.S. 259 (1927) that a taxpayer cannot refuse to provide any financial information on a tax return based upon a blanket assertion of Fifth Amendment privilege totally disregarding and seemingly arriving at an anomolous result from its decision in *U.S. v. Barnes,* 1979, 604 F.2d 121, 146-148, *cert. den.,* 444 U.S. 907 (1980) wherein it was asserted that: "the right to make a valid claim of privilege is available even as to amount of taxpayer's income, as well as any other item on the return which could legitimately cause self-incrimination. *** Since appellants did not claim the privilege on their returns, their Fifth Amendment rights were not violated at trial."

Based upon the aforementioned, direct conflict exists within the Second Circuit Court of Appeals and the *Schiff* decision appears to be transparently invalid or in the alternative the *Barnes* decision, finessed resulting in an untenable position.

After the Second Circuit acted as it did in *Barnes, supra,* to sustain this penalty would be to sanction an indefensible sort of entrapment by the courts, penalizing a citizen for exercising a privilege which the court had clearly told him was available to him.

It offends the basic values underlying our criminal justice system to force a citizen, subject to penalty to

assert "I voluntarily consent" when in fact he does not and then allow that assertion to be introduced against him in an incriminating way at trial or penalize him if he refuses to divulge the amount of income.

It offends the basic values underlying our criminal justice system to force a citizen, subject to penalty to assert "I voluntarily consent" when in fact he does not and then allow that assertion to be introduced against him in an incriminating way at trial or penalize him if he refuses to divulge the amount of income.

Thus, in apposite and contrary to *Edelson's* teachings, plaintiffs were not permitted to submit their claim of privilege to the court for a determination of validity and the court in a vacuum decided that plaintiffs' references to constitutional objections were spurious in spite of proper revelation and basis made via submitted pleadings. The District Court based its decision on the fact that the "plaintiffs neither completed the neutral questions on the tax return, nor indicated on the return the basis for their constitutional objections." The latter would effectively negate the Fifth Amendment and the former fails to reveal what, if any, neutral question is being referred to, or if answered, what waiver would be effected.

It should be noted that this court in *Garner v. U.S.*, 424 U.S. 648 citing *California v. Byers,* 402 U.S. 424, 91 S.Ct. 1535, 29 L. Ed. 2d 9 (1971), there holding that the basic requirement that one's name and address be disclosed is analogous to *Sullivan,* holding only that requiring certain basic disclosures fundamental to a neutral reporting scheme does not violate that privilege.

Waiver

There are three different views pertaining to waiver:

Broad View—Witness discloses a fact or transaction without invoking his privilege against self-incrimination, thereby waives that privilege with respect to the details of particulars of such fact or transaction.

Prevailing View—Disclosure by witness made without invoking his constitutional privilege goes to the extent of showing a criminal transaction on his part, it is a waiver of privilege in the respect of details and particulars of the fact or transaction disclosed. *Rogers v. U.S.,* 340 U.S. 367.

The witness has admitted commission of a crime, he cannot be compelled against privilege claim, to answer a question, when without the answer, it is not possible for Government to convict and punish and answer to that question will probably make possible such conviction and punishment.

Thus, any answer other than that required for identification *i.e.,* name and address could be deemed a waiver and it is unknown to what extent that waiver is applicable.

It becomes evident that a reasonable trier of the facts based on the submitted record could not determine that no basis exists for the Fifth Amendment claims of the plaintiffs herein and that as a matter of law, the plaintiffs fully documented their Fifth Amendment claims and that a genuine issue exists.

As was stated in *Celotex v. Catrett,* 106 S.Ct. 2548, the Court of Appeals did not address the adequacy of the showing made by appellants in opposition to respondent's

motion for summary judgment or whether such a showing would be sufficient for appellants to claim the Fifth Amendment right to silence.

Contrary and in conflict with the holdings in *Edelson, supra,* the Second Circuit affirmed holding "that a taxpayer cannot refuse to provide any financial information on a tax return based upon a blanket assertion of the Fifth Amendment privilege. See *U.S. v. Schiff,* 612 F.2d 73, 83 (2d Cir., 1979)." The Court further concluded that this is plainly supported by the legislative history of §6702 which indicates that the frivolous return penalty was meant to apply to returns "in which many or all of the line items are not filled in except for reference to *spurious constitutional objections*. S.Rep. No. 494, 97th Cong. 2d Sess. 278 reprinted in 1982 Code Cong. and Ad. News 781, 1024." Underline scored. It should be noted that the only basis for deeming these claims spurious is the lower court's finding that the plaintiffs neither completed the neutral questions of the tax return, nor indicated on the return the basis for their constitutional objections" which is contrary to the teachings as to how the privilege is asserted.

This was made clear in *Garner v. U.S.,* 424 U.S. at 665 n. 21 stating:

> No language in this opinion is to be read as allowing a taxpayer desiring the protection of the privilege to make disclosures concurrently with a claim of privilege and thereby to immunize himself against the use of such disclosures. If a taxpayer desires the protection of the privilege, he must claim it instead of making disclosures. Any other rule would deprive the Government of its choice between compelling the evidence from the claimant in exchange for immunity and avoiding the burdens of immunization by obtaining the evidence elsewhere. See *Mackey v. U.S.,* 401 U.S. at 711-713, 91 S.Ct. at 1169-71;

28 L.Ed. 2d at 431-433 (Brennan, J. concurring in judgment).

POINT II

WHETHER A PENALTY CAN BE EXTRACTED UNDER 26 U.S. CODE §6702 FOR THE CLAIMING OF THE RIGHT TO SILENCE UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION WITHOUT THE CLAIMANTS THEREOF BEING PERMITTED, *IN CAMERA*, TO INDICATE THEIR BASIS FOR ASSERTION OF THE PRIVILEGE, OR MAY THE COURT IN A VACUUM DETERMINE THAT A CLAIM IS BASELESS OR SPURIOUS SOLELY ON THE EVIDENCE OF ITS CLAIM ON A TAX RETURN.

As is made obvious by the congressional report at 26 U.S. Code §6702, the basis involved herein for assertion of this civil penalty is whether the Fifth Amendment claim is spurious and/or whether one has the right solely to answer neutral questions on the return, *i.e.*, identification without triggering this penalty feature of the code. In addition, and inapposite to the Supreme Court's ruling in *Garner*, 424 U.S. at 655 n.21, *supra* must a taxpayer indicate on the return the basis for his constitutional objections.

Fifth Amendment

A person's privilege against self-incrimination may not be restricted or thus circumvented or its waiver compelled. Government is prohibited from imposing penalties or sanctions of any kind which would tend to make one's exercise of his right to remain silent "costly." *Spevak v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 2d 574.

"To claim the privilege validly, a defendant must be faced with 'substantial hazards of self-incrimination,' *California v. Byers, supra,* 402 U.S. at 429, 90 S.Ct. at 1538 that are real and appreciable and not merely imaginary and unsubstantial. *Marchetti v. United States, supra,* 390 U.S. at 48, 88 S.Ct. at 702 quoting in part *Rogers v. United States,* 340 U.S. 367, 374-75. 71 S.Ct. 438, 442, 95 L.Ed. 344 (1951). Moreover, he must have 'reasonable cause to apprehend such danger from a direct answer to questions posed to him. *Hoffman v. United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). The information that would be revealed by direct answer need not be such as would itself support a criminal conviction, however, but must simply 'furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id. See also Hashagen v. United States,* 283 F.2d 345, 348 (9th Cir., 1960). Indeed it is enough if the responses would merely 'provide a lead or clue' to evidence having a tendency to incriminate. *Id.* at 348.

It is for the court to decide whether his silence is justified . . . *Hoffman v. United States, supra,* 341 U.S. at 486, 71 S.Ct. at 818. *See also Marchetti v. United States, supra,* 390 U.S. at 50, 88 S.Ct. at 703.

Thus, the defendant is placed in a delicate position well-described by Judge Leonard Hand:

> Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practical solution is to be content with the doors being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it

permits the suppression of competent evidence, nothing better is available. *United States v. Weisman, supra,* 111 F.2d at 262.

Applying these principles to the uncontroverted factual allegations in the record, can it be concluded that the Fifth Amendment is inapplicable herein solely on the Second Circuit's decision in *Schiff, supra,* controverted by *Barnes, supra. See U.S. v. Neff,* 615 F.2d, 1235 (9th Cir., 1980).

The Second Circuit in *U.S. v. Schiff, supra,* specifically pointedly revealed ". . . a taxpayer can comply with the tax laws and exercise his Fifth Amendment rights by listing the amount, not the source of his income from illegal sources directly contradicting its decision in *Barnes, supra,* wherein it was held that acquisition of money by the defendant is admissible, even though the source of the money is not traced citing *U.S. v. Jackskion,* 102 F.2d, 683-684, *cert. den.* 307 U.S. 635 (1939) and further stating that the right to make a valid claim of privilege is available even as to amount of taxpayer's income as well as any other item on the return which could legitimately cause self-incrimination.

See also Aune v. U.S., (D.C.—Ariz.), 582 F.Supp., 1132 (1984) citing *U.S. v. Brown,* 600 F.2d, 248 (10th Cir., 1979) for the proposition that "while the constitutional privilege protects the taxpayer from disclosing the source of his income, it does not protect him from disclosing the amount of his income conflicting with *Barnes, supra.* It was pointedly revealed in *Aune,* inapposite to the facts herein, none of the complaints allege that plaintiff is the subject of a criminal investigation or has been formerly accused of a crime fully indicative of the fact claims therefrom would have been honored.

The Ninth Circuit in *Neff, supra* refused to follow the lead of cases which state the Fifth Amendment will never justify a complete failure to file a return, invalidates a Fifth Amendment defense concluding that it does not have value as a means to determine the validity of *Neff's* assertion of the privilege against self-incrimination at page 1239, n. 4, conflicting with *Schiff, supra*. Moreover, n. 3 at 1239 specifically reveals "Moreover we are not certain that these Circuit Court decisions comport with Supreme Court precedent. The cases indicate that the taxpayer may never assert his privilege against self-incrimination in lieu of tax form responses essential to the calculation of tax liability. This rule, which limits the tax form questions to which a Fifth Amendment response is proper to those questions not essential to tax liability calculation, necessary limits—perhaps too much—the scope of the Supreme Court's declaration in *Garner* that the Fifth Amendment may be asserted on a tax return. 424 U.S. at 662, 96 S.Ct. 1186."

POINT III

MUST THE BASIS FOR CONSTITUTIONAL OBJECTIONS BE REVEALED ON TAX RETURNS IN VIOLATION OF THIS COURT'S HOLDING IN *GARNER V. U.S.*

The District Court specifically required that the basis for constitutional objections must be indicated on the returns. *Hoffman v. U.S.*, 341 U.S. at 486 reveals that it is for the court to decide whether silence is justified, not the Internal Revenue Service and this requirement conflicts with the Court's admonition in *Garner v. U.S.* at n. 21 *supra*.

The Honorable Whitman Knap, J., Southern District of New York in *U.S. v. William Castaldi,* 82 Cr. 838, ruled "apparently the law is clear that the only valid way you can assert the Fifth Amendment is to assert it on your return. Thus, the Fifth Amendment claim accomplished via a letter receipted by the Internal Revenue Service, is an invalid claim of the Fifth Amendment."

Claim of Fifth Amendment

The Supreme Court of the United States in *Quinn v. U.S.,* 349 U.S. 155 (1955) at pages 162-163, stated that there is no prescribed litany to claim the privilege against self-incrimination, and that if objection based on that right is made in any language, the addressee can reasonably be expected to understand the response to be an attempt to invoke the right of silence. "As everyone agrees, no ritualistic formula is necessary to invoke the privilege" at 164.

Petitioners herein are presented with the Hobson's choice between possible self-incrimination or a forfeiture, *i.e.,* frivolous return penalty. It must be unequivocally conceded that a person's privilege against self-incrimination may not be restricted or thus circumvented or its waiver thus compelled.

There exists historically and constitutionally a guaranteed right of defendant or potential defendant to remain completely silent requiring the State to prove its case without any assistance of any kind from the defendant himself. *Williams v. Florida,* 399 U.S. 78, 198; 90 S.Ct. at 1909.

This Court in *Garner v. U.S., supra* specifically related that "§7602(2) of the Code authorizes the service in such circumstances to summon the taxpayer to appear

and to produce records or give testimony. 26 U.S. Code §7602(2). If *Garner* had persisted in his claim when summoned, the Service could have sued for enforcement in District Court, subjecting *Garner* to the threat of the Court's contempt power.

As was stated in n. 6 "18 U.S. Code 6004 would appear to authorize the Service as an alternative to an enforcement suit, to order a summoned taxpayer to make disclosures in exchange for immunity.

To further buttress this procedure, in a 1976 hearing before the Senate Finance Committee, then IRS Commissioner Alexander stated "Taxpayers claiming the Fifth Amendment at time the return is filed by omitting pertinent data file incomplete returns, thus necessitating audit. If secondary sources are insufficient to complete the return, information can only be obtained from the taxpayer. Obtaining such information from taxpayer would generally be at the price of a grant of immunity, result information not available to the Department of Justice."

Judge Vincent L. Broderick, U.S.D.J., Southern District of New York, in *U.S.A. v. Joseph Colombo and Diane Colombo,* M-18-304, refused to accomplish "in a vacuum" that which is attempted to be done by Judge Nickerson herein. With regard to the summons procedure, Judge Broderick related:

> "Well, I just can't accept that it was my intention to overrule the Fifth Amendment privilege because I have some considerable respect for the Fifth Amendment, and I don't see how in a vacuum I could have overruled the Fifth Amendment privilege.
>
> I think the bottom line here is that I deny the Government's application to declare the respondents in contempt."

A court, in practice, must accept the Fifth Amendment privilege where it is "evident" from the implications of the question, in the setting in which it is asked, that a responsible answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. There is no doubt that a defendant is not obliged to give an answer when the answer may support a conviction for a past crime or provide a link in the chain of evidence. All the plaintiffs have exposed their indictments, investigation and allegations in the Justice Department files as to alleged activities.

If the Court considers this as a technicality, it should be pointedly remembered that this involves one of the constitutional rights which makes the difference between a democracy and a police state.

Thus, to deem that one must indicate on an income tax return the basis for constitutional objections evicerates numerous decisions of this court.

POINT IV

SHOULD THE COURT ASSERT ITS SUPERVISORY POWERS TO BAR COMPELLED REVELATION OF THE AMOUNT OF INCOME AND SUBSEQUENT INCRIMINATING USE THEREOF WHICH WOULD VIOLATE THE ESSENCE OF THE ACCUSATORIAL SYSTEM OF JUSTICE.

Under familiar principles laid down in due process cases, these plaintiffs were entitled to have the trial court inspect the Government's records to ascertain the appropriateness of the Fifth Amendment claims. No one questions that Fifth Amendment procedural due process

rights are implicated by penalties for invocation of Fifth Amendment privilege of silence. Government interests in obtaining revenue cannot override the self-incrimination clause of the Fifth Amendment. This would effectively impose an economic sanction upon a self-incrimination claim barred by the Constitution of the United States.

The Internal Revenue Service has taken the Pavlovian posture that "based on your constitutional rights, you are not furnishing information needed to determine your income tax liability is a frivolous position. You have been charged a penalty of $500.00 for filing a document purporting to be an income tax return which contains frivolous arguments to reduce taxes or delay the collection of taxes." It becomes apparent that this penalty is imposed upon anyone who refuses to file an income tax return based on a Fifth Amendment claim which is impermissible under *Minnesota v. Murphy*, 465 U.S. 420 (1984), 104 S.Ct. 1136 re-hearing *den.* 104 S.Ct. 1932.

POINT V

MAY COSTS AND ATTORNEYS' FEES BE AWARDED UNDER FEDERAL RULE OF CIVIL PROCEDURE 11 WITH REGARD TO THE ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE HEREIN.

An appeal is frivolous if the result is obvious or the arguments are wholly without merit. *Dewitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983).

The assertion of sanctions and court costs kills ardent proper advocacy in the courts and deprives taxpayers and defendants their proper representation by counsel.

In *Maness v. Myers,* 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed., 2d 574, it was stated that a lawyer may not be held in contempt for counseling his client in good faith to assert the Fifth Amendment and refuse to produce court ordered materials.

Fifth Amendment claims may involve an exception to the general rule that even erroneous court orders must be obeyed. It is not always possible for the Appellate Court to undue the damage wrought by compulsive testimony or production, so a witness may properly decide to risk a contempt citation in order to obtain pre-compliance review of the merits of his Fifth Amendment arguments. Where a lawyer, subject to contempt for advising the client to invoke the privilege, or in the extant situation, be assessed costs, he might fail to give such advice and deprive his client of the ability to make the choice. Viewed in this way, this advice "becomes an integral part of the protection accorded the witness by the Fifth Amendment."

If the Government wishes to have these taxpayers file returns, it should obtain use immunity for them as to any criminal proceedings other than one relating to perjury.

This procedure strikes a fair balance not unlike that sought by the Third Circuit in *Iannelli v. Long,* (3d Cir., 1973) 487 F.2d 317. The District Court in that case, in order to avoid forcing the taxpayers to incriminate themselves, temporarily enjoined further collection efforts by the commissioner. The Circuit concluded that such relief was improper in light of the tax injunction statute by reason that the District Court could obtain the same result by deferring further proceedings in the action to the conclusion of related criminal proceedings or until all applicable periods of limitations had run.

It has been said that rights and privileges are like muscles; if you exercise them, they will strengthen, and if you do not, they will atrophy. It is the obligation of each member of the Bar to assure that continual exercise.

The imposition of sanctions in this type of situation bars ardent proper advocacy and deprives individuals of their proper representation of counsel by frustrating creativity and imaginative legal principles to be presented.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MURRAY APPLEMAN
A Member of the Bar of the United States Supreme Court
Atorney for Petitioners Frank Leogrande, et al.
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APPENDIX A—JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 767—August Term, 1986

(Argued: February 6, 1987 Decided: February 10, 1987)

Docket No. 86-6217

FRANK LEOGRANDE, FRANK SALERNO, EUGENE LEOGRANDE, NICHOLAS BONINA, IRA BAER, MITCHELL DRUCKER, EDWARD ZIMMERMAN, CHRISTOPHER FURNARI, and PETER LODUCA,

Plaintiffs-Appellants,

— v. —

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

TIMBERS, PIERCE, and ALTIMARI,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York (Nickerson, *J.*), granting summary judgment to appellee, dismissing appellants' complaints seeking a refund of penalties assessed for filing frivolous tax returns, and awarding appellee costs and attorney's fees.

Affirmed.

MURRAY APPLEMAN, Esq., New York, N.Y., *for Plaintiffs-Appellants.*

B. PAUL KLEIN, Esq., Tax Division, Department of Justice, Washington, D.C. (Charles E. Brookhart, Michael L. Paup, Roger M. Olsen, Assistant Attorney General, Andrew J. Maloney, United States Attorney for the Eastern District of New York, of counsel), *for Defendant-Appellee.*

PER CURIAM:

Each of the nine appellants herein filed an income tax return for the year 1983 which provided only information as to his name, address, social security number, and the amount of estimated 1983 taxes paid or amount applied from his 1982 return. All other items were left blank except for the entry of "Fifth & Sixth Amendments to Constitution" on the line provided for miscellaneous income. No other neutral information or financial data was provided, nor were the returns signed or verified in any way.

The Internal Revenue Service ("IRS") determined that the taxpayers' returns fell within the scope of the frivolous return penalty provision of 26 U.S.C. § 6702 (1982) and assessed a $500 penalty against each taxpayer. Each taxpayer paid fifteen percent of the penalty ($75) as required by 26 U.S.C. § 6703(c) (1982) as a condition of filing a refund claim, and then each submitted a refund claim. The IRS denied their claims, whereupon appellants brought suits for refunds in the district court. The district court granted the government's motion for summary judgment and dismissed appellants' complaints, ruling that the IRS had properly assessed the penalties. We agree.

It has long been settled since *United States v. Sullivan,* 274 U.S. 259 (1927), that a taxpayer cannot refuse to provide any financial information on a tax return based upon a blanket assertion of Fifth Amendment privilege. *See United States v. Schiff,* 612 F.2d 73, 83 (2d Cir. 1979). We have held, as have other circuits, that a return devoid of any financial information based upon a claim of constitutional privilege falls within the meaning of § 6702. *Paulson v. United States,* 758 F.2d 61, 62 (2d Cir. 1985) (per curiam); *accord, Eicher v. United States,* 774 F.2d 27, 29 (1st Cir. 1985) (per curiam); *Ricket v. United States,* 773 F.2d 1214, 1216 (11th Cir. 1985) (per curiam); *Hudson v. United States,* 766 F.2d 1288, 1291 (9th Cir. 1985) (per curiam); *Boomer v. United States,* 755 F.2d 696, 697 (8th Cir. 1985) (per curiam); *Betz v. United States,* 753 F.2d 834, 835 (10th Cir. 1985) (per curiam); *Brennan v. Commissioner of Internal Revenue,* 752 F.2d 187, 189 (6th Cir. 1984) (per curiam). This conclusion is plainly supported by the legislative history of § 6702 which indicates that the frivolous return penalty was meant to apply to returns "in which many or all of the line

items are not filled in except for reference to spurious constitutional objections." S. Rep. No. 494, 97th Cong., 2d Sess. 278, *reprinted in* 1982 U.S. Code Cong. & Ad. News 781, 1024.

Appellants' argument that the documents they filed did not purport to be returns within the meaning of § 6702 is utterly without merit. The forms filed by appellants were entitled "U.S. Individual Income Tax Returns—1983" and were thus clearly intended to be returns. Moreover, it is precisely this type of situation that the statute was intended to reach. The statute speaks not in terms of the filing of a valid return but in terms of an individual filing "what *purports* to be a return." 26 U.S.C. § 6702(a)(1) (1982) (emphasis added). Thus, it is clear that the documents filed by appellants constituted "purported returns" and fell within the meaning of § 6702. *See Olson v. United States,* 760 F.2d 1003, 1005 (9th Cir. 1985).

Appellants' other arguments are similarly without merit. For instance, appellants argue that § 6702 applies only to "tax protestors" and not to those who choose to remain silent because of fear of potential criminal prosecution. However, the statute was enacted to penalize specific, objective conduct and it applies to all citizens, whatever their reasons for filing returns such as the instant ones.

The judgment of the district court, including its award of costs and attorney's fees pursuant to Federal Rule of Civil Procedure 11, is affirmed. In the past we have assessed double costs and attorney's fees under Federal Rule of Appellate Procedure 38 for appeals as frivolous as this one. *Paulson,* 758 F.2d at 62. We think the imposition of sanctions to be appropriate in this case as well. Accordingly, appellants and their attorney are assessed

double costs in this Court plus a reasonable attorney's fee to the appellee in the total amount of $3,000. This amount, to be paid one-half by appellants in equal pro rata shares and one-half by their attorney, shall be paid to the United States within fourteen days of the date of this decision on pain of penalty for contempt. *See Schiff v. Commissioner of Internal Revenue*, 751 F.2d 116, 117 (2d Cir. 1984) (per curiam); *See also Church v. Commissioner of Internal Revenue*, No. 86-4128, slip op. 1067, 1069-70 (2d Cir. Jan. 20, 1987) (per curiam). The mandate shall issue forthwith.

APPENDIX B—JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK LEOGRANDE,

Plaintiff,

against

UNITED STATES OF AMERICA,

Defendant.

---

85 C 4109
MEMORANDUM AND ORDER

MURRAY APPLEMAN, ESQ.
New York, New York
for plaintiff

ANDREW J. MALONEY, United States Attorney
(Robert L. Begleiter, Assistant United States Attorney, Merrell B. Green, Trial Attorney, Tax Division, United States Department of Justice, of counsel)
Brooklyn, New York
for defendant

NICKERSON, District Judge

This court consolidated nine cases in which plaintiffs sought to recover penalties assessed for their alleged filing of a frivolous tax return. Defendant moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiffs filed a form 1040 for 1983 that included their name, address, social security number, amount of federal income tax withheld and tax payments applied from 1982. In place of financial data they wrote "fifth and sixth amendments to constitution," and did not sign the returns.

The Internal Revenue Service (IRS) determined that the purported tax return constituted a frivolous return under the provisions of 26 U.S.C. §6702 and assessed plaintiffs a $500 penalty. Plaintiffs paid the required fifteen percent of their assessed penalties and filed claims for refunds with the IRS. The IRS denied their claims.

Section 6702 states in pertinent part that "if any individual files what purports to be a return . . . which . . . does not contain information on which the substantial correctness of the self-assessment may be judged . . . and . . . the conduct . . . is due to . . . a position which is frivolous . . . then such individual shall pay a penalty of $500."

The legislative history provides examples of frivolous returns and includes one in which "many or all of the line items are not filled in except for references to spurious constitutional objections." S. Rep. No. 494, 97th Cong. 2d Sess. 278, *reprinted in* 1982 U.S. Code Cong. & Ad. News 781, 1024. Plaintiffs' purported returns clearly fall into this category.

The Second Circuit, citing the Supreme Court's decision in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 79 (1965), has held that a "self-incrimination claim 'against every question on the tax return' would be 'virtually frivolous.' " *Paulson v. United States,* 758 F.2d 61, 62 (2d Cir. 1985). Plaintiffs neither completed the neutral questions of the tax return nor indicated on the

return the basis for their constitutional objections. The IRS properly assessed the penalty.

Defendant moves for costs and attorney's fees under Federal Rule of Civil Procedure 11. That rule states that the signature of an attorney or party constitutes a certificate by him that to the best of his knowledge "after reasonable inquiry" the pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension modification, or reversal of existing laws. . . ." The standard is intended to be more exacting than the previous good-faith formula.

There is no basis in law for plaintiffs' claims. They have cited no cases that hold that tax returns similar to those they filed for 1983 are not frivolous. Defendant asserts, and plaintiffs do not contest, that the federal district court in New Jersey has dismissed recently four substantially identical actions brought by plaintiffs' attorney and awarded costs and attorney's fees.

Plaintiffs and their attorney shall share equally the burden of paying attorneys' fees incurred in defending this suit and are held jointly and severally liable for that amount. *See Raffe v. Citibank,* No. 84-305 (E.D.N.Y. Aug. 1, 1984).

The motion for summary judgment is granted. Defendant shall submit affidavits of hours spent, fees sought and costs. So ordered.

Dated: Brooklyn, New York
August 26, 1986

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

Supreme Court, U.S.
FILED
JUL 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1807

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRANK LEOGRANDE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Albertson v. *SACB*, 382 U.S. 70 (1965)	4
Borgeson v. *United States*, 757 F.2d 1071 (10th Cir. 1985)	3
Duignan v. *United States*, 274 U.S. 195 (1927)	5
Eicher v. *United States*, 774 F.2d 27 (1st Cir. 1985)	4
Garner v. *United States*, 424 U.S. 648 (1976)	4
Martin-Trigona v. *Gouletas*, 634 F.2d 354 (7th Cir.), cert. denied, 449 U.S. 1025 (1980)	5
Moore v. *Commissioner*, 722 F.2d 193 (5th Cir. 1984)	4
Ricket v. *United States*, 773 F.2d 1214 (11th Cir. 1985)	4
Ueckert v. *Commissioner*, 721 F.2d 248 (8th Cir. 1983)	4
United States v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980)	4, 5
United States v. *Brown*, 600 F.2d 248 (10th Cir.), cert. denied, 444 U.S. 917 (1979)	4
United States v. *Edelson*, 604 F.2d 232 (3d Cir. 1979)	4
United States v. *Heise*, 709 F.2d 449 (6th Cir.), cert. denied, 464 U.S. 918 (1983)	4
United States v. *Lovasco*, 431 U.S. 783 (1977)	5
United States v. *Neff*, 615 F.2d 1235 (9th Cir.), cert. denied, 447 U.S. 925 (1980)	4
United States v. *Schiff*, 612 F.2d 73 (2d Cir. 1979)	4
United States v. *Sullivan*, 274 U.S. 259 (1927)	4, 6
United States v. *Vance*, 730 F.2d 736 (11th Cir. 1984)	6
United States v. *Verkuilen*, 690 F.2d 648 (7th Cir. 1982)	4

Constitution, statutes and rule:

U.S. Const. Amend. V	2, 4, 5
Internal Revenue Code (26 U.S.C.):	
§ 6065	3

Constitution, statutes and rule—Continued: Page

§ 6702 ..... 1, 2, 4
§ 6702(a) 3
§ 6703(c) 2
Fed. R. App. P. 38 3

Miscellaneous:

S. Rep. 97-494, 97th Cong., 2d Sess. (1982) 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in upholding the IRS's assessment of the $500 "frivolous return" penalty under Section 6702 of the Internal Revenue Code[1] for filing a Form 1040 containing a statement of constitutional objection, rather than financial information.

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

1. Each petitioner filed a Form 1040 for the 1983 tax year which provided only his name, address, social security number, and the amount of estimated taxes paid or amount applied from the 1982 return (line 58). All the remaining line items, except one, were left blank. The space provided for "miscellaneous income" contained the words "Fifth and Sixth Amendments to Constitution." The purported returns thus contained no financial information regarding income or deductions from which tax liability could be computed, nor did they specify any asserted tax liability. The purported returns, including the statement of constitutional objection, were not signed under penalty of perjury, nor verified in any other manner. Pet. App. 2a.

The Internal Revenue Service determined that petitioners' purported returns fell within the scope of the "frivolous return" penalty provision of Section 6702 of the Code and assessed the $500 penalty against each taxpayer. Pursuant to Section 6703(c) of the Code, each petitioner paid 15% of the penalty ($75) and filed an administrative claim for refund. Following the Commissioner's denial of those refund claims, petitioners brought the instant refund suits, which were consolidated in the United States District Court for the Eastern District of New York. Pet. App. 3a.

The government moved for summary judgment, and petitioners filed a response in which they attempted to justify their invocation of the Fifth Amendment privilege on their tax returns by asserting that they either had been charged with or were under investigation for certain crimes (see C.A. App. 160-161; Pet. 3). After a hearing, the district court granted the government's motion for summary judg-

ment and awarded costs and attorneys' fees to the government (Pet. App. 6a-8a). The court explained in rejecting petitioners' arguments that they "neither completed the neutral questions of the tax return nor indicated on the return the basis for their constitutional objections" (*id.* at 7a-8a).

The court of appeals unanimously affirmed in a per curiam decision (Pet. App. 1a-5a; 811 F.2d 147). The court noted that "[i]t has long been settled * * * that a taxpayer cannot refuse to provide any financial information on a tax return based upon a blanket assertion of the Fifth Amendment privilege" (Pet. App. 3a). In light of the long line of cases rejecting petitioners' contentions, the court of appeals concluded that petitioners' appeal was frivolous and awarded the government double costs and a reasonable attorney's fee in a total amount of $3,000, to be paid one-half by petitioners and one-half by their attorney. Pet. App. 4a-5a; see Fed. R. App. P. 38.

2. Section 6702(a) of the Code provides for the imposition of a $500 penalty upon an individual who files an income tax return or purported return that fails to "contain information on which the substantial correctness of the self-assessment may be judged" if such conduct is due to "a position which is frivolous * * *." Here, petitioners basically left their Forms 1040 blank, except for identifying information, purporting to raise a constitutional privilege with respect to one line item. Moreover, petitioners did not sign or verify the purported returns, as required by Section 6065 and by Form 1040 itself, nor did petitioners explain or verify their assertion of constitutional privilege. See *Borgeson* v. *United States*, 757 F.2d 1071 (10th Cir. 1985). As the court of appeals explained (Pet. App. 3a-4a), the legisla-

tive history of Section 6702 makes clear that the "frivolous return" penalty was meant to apply to returns "in which many or all of the line items are not filled in except for reference to spurious constitutional objections." S. Rep. 97-494, 97th Cong., 2d Sess. 278 (1982). Thus, petitioners' Forms 1040 plainly fell within the ambit of Section 6702, and the IRS's imposition of the "frivolous return" penalty was amply justified.

Petitioners' assertion of constitutional privilege on their purported returns does not alter this result. Consistent with decisions of this Court,[2] the courts of appeals have uniformly rejected the notion that a taxpayer may refuse to provide any financial information at all on a tax return by blanket assertion of a Fifth Amendment privilege.[3] Petitioners assert (Pet. 8) that this rule is inconsistent with a statement in *United States* v. *Barnes*, 604 F.2d 121, 148 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980), suggesting that a taxpayer may claim the Fifth Amendment privilege with respect to the *amount* of

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[2] See, *e.g.*, *Garner* v. *United States*, 424 U.S. 648, 651 (1976); *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965); *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927).

[3] See, *e.g.*, *Eicher* v. *United States*, 774 F.2d 27, 29 (1st Cir. 1985); *United States* v. *Schiff*, 612 F.2d 73, 77, 83 (2d Cir. 1979); *United States* v. *Edelson*, 604 F.2d 232, 234-235 (3d Cir. 1979); *Moore* v. *Commissioner*, 722 F.2d 193, 195 (5th Cir. 1984); *United States* v. *Heise*, 709 F.2d 449, 451 (6th Cir.), cert. denied, 464 U.S. 918 (1983); *United States* v. *Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *Ueckert* v. *Commissioner*, 721 F.2d 248, 250 (8th Cir. 1983); *United States* v. *Neff*, 615 F.2d 1235, 1239 (9th Cir.), cert. denied, 447 U.S. 925 (1980); *United States* v. *Brown*, 600 F.2d 248, 251-252 (10th Cir.), cert. denied, 444 U.S. 917 (1979); *Ricket* v. *United States*, 773 F.2d 1214 (11th Cir. 1985).

his income. This statement is dictum that has never been followed by any court of appeals. And, of course, to the extent that petitioners view this dictum and the decision below as creating some tension within the Second Circuit, that presents no occasion for review by this Court; rather, petitioners more appropriately should have sought rehearing en banc to address the *Barnes* dictum.

In any event, petitioners obviously have not made a sufficient showing to justify any invocation of the privilege in connection with their tax returns, much less a blanket refusal to supply any financial information at all. The bare fact that there are criminal proceedings pending against a claimant is not enough to invoke the privilege; there must be a nexus between the risk of conviction and the information requested. See *Martin-Trigona* v. *Gouletas*, 634 F.2d 354, 360 (7th Cir.), cert. denied, 449 U.S. 1025 (1980). Here, petitioners' representation that they were accused or suspected of crimes (see Pet. 3) failed to demonstrate that properly completing a tax return would have posed a substantial danger of self-incrimination.[4]

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[4] Petitioners suggest (Pet. 12) that they had inadequate opportunity to justify their assertion of the Fifth Amendment privilege because the district court improperly refused to conduct an *in camera* hearing. This contention was only barely alluded to by petitioners in the court of appeals (see Pet. C.A. Br. 15), and it was not addressed by that court; the contention is thus not appropriate for consideration by this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). In any event, the contention is wholly without merit. Petitioners had ample opportunity in the district court to justify their assertion of privilege by means of affidavits and their briefs and argument on the government's motion for

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1987

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summary judgment. They failed to do so. The fact of the matter is that there is no conceivable justification for leaving almost the entire Form 1040 blank, without even claiming a privilege as to all but one of the items left blank. See *United States* v. *Sullivan, supra.* An *in camera* hearing could not have helped petitioners. Indeed, the Eleventh Circuit has specifically held that an *in camera* hearing is not necessary to determine the validity of a return on which a taxpayer asserts a blanket claim of privilege against self-incrimination. *United States* v. *Vance,* 730 F.2d 736, 737-738 (11th Cir. 1984).

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